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Supreme Court of the United States

October Term, 1942.

No. **851**

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JACK SHILKRET,

Respondent,

AGAINST

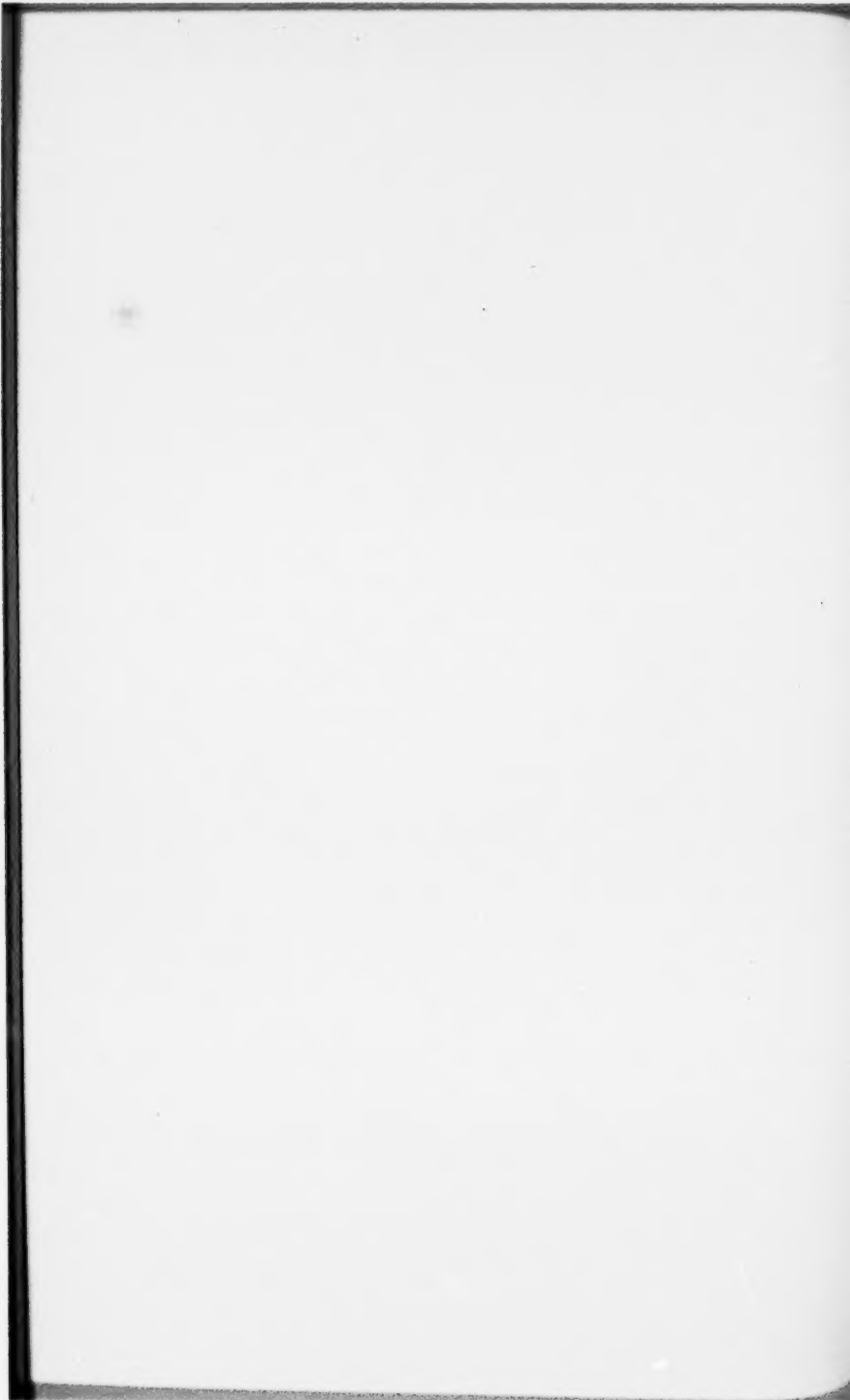
MUSICRAFT RECORDS, INC.,

Petitioner.

**Petition for a Writ of Certiorari to the
United States Circuit Court of Appeals
for the Second Circuit, and Brief
in Support Thereof.**

MAURICE L. RABBINO,
Attorney for Petitioner.

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MUSICRAFT RECORDS, INC.,
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PETITION FOR WRIT OF CERTIORARI.

*To the Honorable, the Chief Justice and Associate Justices
of the Supreme Court of the United States:*

The undersigned, on behalf of the above named petitioner, respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered in the above case on the 29th day of December, 1942, reversing the judgment of the District Court of the United States for the Southern District of New York, which dismissed the complaint of the respondent.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on December 29, 1942 (R. p. 30). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended (U. S. C. A. Title 28, Sec. 347).

Summary and Short Statement of the Matter Involved.

This is an action under the Copyright Act of 1909. The complaint alleged that the plaintiff composed a new arrangement of "Southern Roses Waltz" by Johann Strauss, and that the said composition, never having been printed or published, was forwarded to the Register of Copyrights, and a certificate under Entry Class E Unpublished was issued to the plaintiff pursuant to the provisions of Section 11 of the Copyright Act. The complaint further alleges that the defendant mechanically reproduced the said composition in the form of phonograph records and sold the recordings without the knowledge or consent of the plaintiff, and that this mechanical reproduction was an infringement of the plaintiff's copyright (R. pp. 3-11).

Defendant moved for an order under Rule 12 (b) of the Rules of Civil Procedure to dismiss the complaint on the ground that copyright protection is not extended to the holder of a copyright of an unpublished work registered under Section 11 against an alleged infringement by mechanical reproduction (R. p. 2).

Defendant's motion was granted, and the complaint was dismissed for failure to state a cause of action (R. pp. 20-21).

The District Court (per Leibell, *D. J.*) held that Section 1 (e) of the Copyright Act barred a Section 11 copyright owner from the exclusive right to the mechanical reproduction of his work since Section 1 (e) in express terms limited copyright protection in respect to mechanical reproduction to "compositions published and copyrighted after July 1, 1909" (R. pp. 12-19).

The Circuit Court reversed by a divided court, interpreting Section 1 (e) to include the holder of a Section 11 copyright (R. pp. 25-30).

The Questions Presented.

The questions presented are:

1. Whether Section 1 (e) of the Copyright Law in extending copyright protection to mechanical reproduction limits its application to published compositions.
2. Whether a work copyrighted under Section 11 has been published within the meaning of Section 1 (e).
3. Whether the holder of a copyright of an unpublished work under Section 11 is afforded any protection by the Copyright Law against alleged infringements by mechanical reproduction.

Reasons for Granting the Writ.

1. This case involves an important question of Federal law which has not been, but should be, decided by this Court. As Swan, *C. J.*, pointed out in the prevailing opinion, "This case presents an interesting question of first impression involving the interpretation of the Copyright Act of 1909" (R. p. 25).

2. The decision of the Circuit Court in this case has far-reaching consequences since it involves a determination of what protection is extended to the holder of a copyright under Section 11, particularly with respect to the increasingly important rights of mechanical reproduction. For the years 1938, 1939 and 1940, over 75,000 of such copyrights were filed with the Register of Copyrights. (Copyright Office, Catalog of Copyright Entries, Part 3, Musical Compositions.) They are all directly affected by this decision.

3. The decision of the Circuit Court in holding that a work copyrighted under Section 11 has been published, is in direct conflict with the framework and design of the

Copyright Law of 1909 and the Rules and Regulations for the Registration of Claims to Copyright. The distinction between published and unpublished works is part of the fundamental plan of the Copyright Act, and the procedure which is set forth in the Rules is based upon that distinction. The Circuit Court decision has to a great extent nullified that distinction with the anomalous result that an unpublished composition registered under Section 11 as an unpublished work and intended to be copyrighted as such, becomes by the mere act of deposit a published work.

4. The interpretation given the words "copyrighted and published" under Section 1 (e) of the Copyright Act conflicts with the interpretation given these words in *Patterson v. Century Productions Inc.*, 93 F. 2nd 489 (C. C. A. 2); *Joe Mittenhal v. Irving Berlin*, 291 F. 714 (D. C. S. D., N. Y.); *Leibowitz v. Columbia Graphophone Co.*, 298 F. 343 (D. C. S. D., N. Y.). In those cases a sharp and clear distinction between published and unpublished works is made. In view of these conflicting interpretations upon matters which affect the fundamental rights of copyright owners, a confusion evidenced by the fact that of the four judges who heard this case, two have decided one way and two the other, there should be a definite determination of this question by this Court.

WHEREFORE it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Second Circuit should be granted.

Dated, New York, March 22, 1943.

MAURICE L. RABBINO,
Attorney for Petitioner.

